UPREME COURT. U. S.

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JOHN F. DAVIS, CLERK

No. 173

In the

Supreme Court of the United States

OCTOBER TERM, 1968

RICHARD E. GORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Rehearing From the Denial of the Petition for a Writ of Certiorari.

REPLY MEMORANDUM TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION

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MOTION FOR LEAVE TO FILE REPLY MEMORANDUM

Petitioner, through his counsel, moves this Court for leave to file the attached memorandum in reply to the "Memorandum in Response to Petition for Rehearing". The grounds for this motion are that the government's memorandum introduces questions of fact and law to which reply is appropriate. It is believed that this reply will aid the Court in its determination of the petition for rehearing.

Respectfully submitted,

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REPLY MEMORANDUM

The government's memorandum filed at the request of the Court asserts propositions both of law and fact which have been repeatedly rejected by this Court in other cases wherein the matter of illegal electronic eavesdropping has become an issue. It is interesting to note that in the government's original supplemental memorandum of disclosure filed with this Court after the denial of certiorari, the government stated that it was their intention to make a full disclosure of the overheard conversations to the District Court in accordance with the procedure which this court would prescribe in *Alderman* v. *United States,* No. 133, O.T. 1967. To maintain as it now does that the

purported hearings in the District Court were in accordance with the opinion of this court rendered in that matter on March 10, 1969 is a rather startling development.

In both appearances in the District Court the record which has been filed with the Clerk of this Court shows that the petitioner, rather than demanding immediate hearing, was at pains to persuade the District Court to await development in this Court on the related matters and on what had been filed in his own behalf with this Court as a result of the disclosure made by the Government.

Even in the colloquy between the Court and petitioner's counsel, wherein it was "conceded" that the content of the log was not material to the charges of wilful failure to file tax returns, it is apparent that no evidence was to be taken nor contentions as to arguable relevancy to be heard. Thus, was precluded the minimal to which this court said the petitioner was entitled.

> "Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to nothing else." *37 L.W. 4195.*

This court was made aware in the *Alderman* case that the interdepartmental examination extends only to the overheard conversations themselves, and not to investigative reports reflecting leads or evidence obtained as fruits of the illegality. In *Black,* it became apparent that the logs of the recorded conversations were innocuous, but the secondary materials deriving from the logs revealed government concern with Black's tax case. In

Alderman it was argued to this Court that agent Pennypacker disclosed the purpose of surveillance is intelligence-gathering primarily used as a means of obtaining leads for investigation of the target subject through compiling information of his activities and the activities of every person with whom he comes in contact.

In his affidavit appended to the Petition for Rehearing filed by this petitioner, he states he can identify with reasonable certainty the location of the electronic surveillance and states that he frequented that location. He should have been allowed to inquire into the duration of the surveillance, and the portent of the intelligence gleaned from it, if any there was.

The government further assures that "no such surveillance was ever conducted on petitioner's premises". It admits that it has logs of additional conversations "in which petitioner was mentioned," but does not remind the court that the entries of such conversations were on four index cards. Although the trial judge refused to indicate the number of entries, the ordinary index card has ten lines, so it can be estimated that something in excess of 31 entries occurred. Assuming, and we do, that petitioner himself was not overheard, may not inquiry be made into whether or not the physical surveillance showed him to be present, though silent?

Further, the assurance that the surveillance was never conducted on his premises is reminiscent of the like assurances made in regard to *Alderisio*.

> "In its brief on reargument, the Government suggests that no electronic surveillance was conducted at places owned by Alderisio, but rather was carried out only at premises owned by his associates or by firms which employed him. The Government also contends

> that Alderisio himself did not have desk space at the subject premises. Finally, the Government asserts that Alderman neither participated in any conversation overheard nor had any interest in the places which were the object of the surveillance. These allegations by the Government will have to be considered by the District Court in the first instance, and we express no opinion now on their merit." *37 L.W. 4190, fn. 1.*

While we accept the representation of the Solicitor General that *their* investigation developed only one instance in which petitioner was actually overheard, inquiry should be made into the extent of that investigation and what it constituted.

The efficacy of the government's investigation into its own files has fallen far short of perfect in many recent cases, e.g. *Black* v. *United States,* 385 U.S. 26, wherein after the original miniscule disclosure adversary proceedings disclosed numerous additional overhearings which led to a new trial being ordered. Also in *Hoffa* v. *United States,* No. 895, This Term, after an assertion by the government of only one illegal electronic eavesdropping incident, adversary proceedings disclosed numerous other instances which required this Court for the second time to order that matter back to the District Court for additional fact-finding hearings.

To state that petitioner's counsel did not ask for copies of additional logs in the purported hearing is to demonstrate that because of what took place, the petitioner was not able to conduct an orderly pursuit of discovery and because of the Court's quashing of the subpoena relative to the F.B.I. index cards, no orderly discovery and adversary proceedings were available.

Your petitioner is not seeking to rummage through files of the Department of Justice in order to question the veracity of the representations by the government, even though these have in the past fallen far short of being completely informed. It has been demonstrated that the control of inter-departmental proceedings by offending agencies raises serious problems. The agents are not subjected to cross examination; the scope of the inquiry can never be as broad as when opposing counsel are present to press for additional facts and documents. This Court now has established a procedure for the conduct of these hearings and their scope, and your petitioner seeks no more nor any less than that which has been accorded other petitioners in similar circumstances.

CONCLUSION

The Government's Memorandum demonstrates again the need for this Court to guide the circumstances under which electronic surveillence should be disclosed. For these reasons, your petitioner prays that a rehearing be granted and that upon the rehearing a Writ of Certiorari issue, the judgment be reversed, and the cause remanded for further proceedings.

Respectfully submitted,

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